

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BONNIE CREED)	
Claimant)	
VS.)	
)	Docket No. 228,677
EUREST (COMPASS GROUP USA))	
Respondent)	
AND)	
)	
CONTINENTAL NATIONAL AMERICAN GROUP)	
Insurance Carrier)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Jon L. Frobish on February 19, 1999.

APPEARANCES

Steven R. Wilson of Wichita, Kansas, appeared on behalf of claimant. D. Steven Marsh of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded benefits for a 17 percent permanent partial disability to the right lower extremity. He did so based on the rating by Dr. Pedro A. Murati which he considered to be based on the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition, after finding that the ratings by two other physicians were not based on the *Guides*. On appeal, respondent argues that one of the other ratings was based on the *Guides* and a third opinion was a 0 percent rating and there was no impairment to be rated under the *Guides* or otherwise. The nature and extent of disability is the only issue on appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified to award benefits for 7 percent permanent partial disability to the right lower extremity.

Findings of Fact

1. In September 1997, claimant injured her right knee when she slipped and fell while working for respondent. The injury resulted in a nondisplaced fracture of the patella.

2. Three physicians have provided ratings of impairment in claimant's right lower extremity. Dr. Thomas W. Kneidel found no impairment, Dr. Bernard T. Poole rated the impairment as 5 percent, and Dr. Murati found 17 percent impairment.

3. Dr. Kneidel found no loss of range of motion, no instability, and no swelling. His record contained no mention of flexion contracture, and he testified he would usually record it if he had observed it. When asked to justify his 0 percent rating under the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition, Dr. Kneidel quoted from page 84 of the *Guides* which authorizes two methods of rating claimant's condition:

Fractures in and about joints with degenerative changes should be rated either by using this section and combining (Combined Values Chart, p. 322) the rating for arthritic degeneration or by using the range of motion section.

Dr. Kneidel testified he chose the range of motion section. Dr. Kneidel acknowledged that Table 64 of the *Guides* would support a finding of 7 percent impairment. He also acknowledged the *Guides* recommended that he use the higher of the ratings supported by the two authorized methods.

4. Dr. Poole testified claimant's examination was normal. His report states she has a stable knee with a full range of motion, both passive and active. His report continues:

In my opinion, this patient has a 5% disability of this knee joint because of a healed, undisplaced fracture of the patella.

In his deposition, he explained that he gave the 5 percent because of continued complaints of pain. He first states he did not use the *AMA Guides* because they are not mandatory for use. But he also states that his rating is in keeping with the *Guides*.

5. Dr. Murati states that he based his 17 percent rating on the Fourth Edition of the *AMA Guides* and refers to page 85, Table 64, and page 78, Table 41. Table 64 provides a 7 percent rating for undisplaced and healed patellar fracture. Table 41 provides impairment based on loss of range of motion in the knee. Dr. Murati found flexion contracture and assigned 10 percent impairment for the flexion contracture. Dr. Murati then added the two impairments to arrive at the 17 percent rating. When questioned about

adding the two, Dr. Murati justified the addition of both by referring to the following statement in section 3.2i:

The physician, in general, should decide which estimate best describes the situation and should use only one approach for each anatomic part. For instance, a patient with a femoral neck fracture with nonunion, who requires one crutch, should be rated either for use of the crutch or for the nonunion plus the range of motion restriction, whichever is greater.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).
2. K.S.A. 1997 Supp. 44-510d(23) provides that impairment of a scheduled member should be determined using the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition.
3. Based on the medical testimony in this case, the Board concludes claimant's disability should be based on the diagnosis of undisplaced healed fracture of the patella as referred to in Table 64. Table 64 assigned a 7 percent rating to this condition. The Board concludes the evidence establishes more probably than not claimant does not have the flexion contracture used for the 10 percent rating.¹ Neither Dr. Poole nor Dr. Kneidel found this contracture. But the Board agrees, as testified to by Dr. Murati, Table 64 is the appropriate source of the rating under the *AMA Guides*. In our view, Dr. Poole, in effect, testified he was not using the *Guides*. Dr. Kneidel acknowledged the *Guides* recommend he use the higher rating. For these reasons, the Board concludes the 7 percent impairment assigned pursuant to Table 64 is the appropriate impairment and disability under the Act.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on February 19, 1999, should be, and is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Bonnie Creed, and against the respondent, Eurest (Compass Group USA), and its insurance carrier,

¹ The Board does not believe it would be appropriate to add the two ratings even if a flexion contracture exists. In the example used, femoral fracture with nonunion, Table 64 specifically authorizes adding the range of motion criteria to the impairment from Table 64. For the nondisplaced patellar fracture claimant has, Table 64 does not authorize adding range of motion criteria. For claimant's condition, Table 64 assigns only a 7 percent rating for the diagnosis.

Continental National American Group, for an accidental injury which occurred September 18, 1997, and based upon an average weekly wage of \$234.15, for 3.2 weeks of temporary total disability compensation at the rate of \$156.11 per week or \$499.55, followed by 13.78 weeks at the rate of \$156.11 per week or \$2,151.20 for a 7% permanent partial scheduled injury to the right lower extremity, making a total award of \$2,650.75, all of which is currently due and owing in one lump sum, less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of May 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Steven R. Wilson, Wichita, KS
D. Steven Marsh, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director